88-777

No.____

Supreme Court, U.S.
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In The
# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

GUANGZHOU MARITIME
TRANSPORT BUREAU OF CHINA,
*Petitioner*

v.

HUGHES DRILLING FLUIDS,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 7, 1988

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## QUESTIONS PRESENTED

1. Whether a forum selection clause in a foreign carrier's bill of lading subject to the Carriage of Goods by Sea Act is invalid *per se* if it specifies a non-U.S. forum for litigation or arbitration?

2. Whether a forum selection clause is enforceable in a dispute limited to general average?

## LIST OF PARTIES

The Petitioner, Guangzhou Maritime Transport Bureau of China, is the owner of the vessel LUO FU SHAN.

The Respondent, Hughes Drilling Fluids, is the owner of cargo of drilling barite shipped aboard the vessel.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Guangzhou Maritime Transport Bureau of China respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on August 22, 1988.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix "A") is reported at 852 F.2d 840 (5th Cir. 1988). The District Court's Memorandum Opinion and Order (Appendix "B") is reported at 1988 A.M.C. 82 (E.D.La. 1987).

## JURISDICTION

The Judgment of the Court of Appeals was entered on August 22, 1988, *infra*. No petition for rehearing or rehearing *en banc* was sought. This petition is sought within 90 days of judgment pursuant to 28 U.S.C. 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

## CONSTITUTIONAL PROVISION INVOLVED

Article III, §2 of the United States Constitution provides:

> The judicial power shall extend ... to all cases of admiralty and maritime jurisdiction.

## STATUTE INVOLVED

46 U.S.C. §§1301-1315.Carriage of Goods by Sea Act.

46 U.S.C. §1303(8). Limitation of liability for negligence:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or

> the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or a similar clause, shall be deemed to be a clause relieving the carrier from liability.

46 U.S.C. §1305. Surrender of right; increase of liability; charter party; general average.

> A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.
>
> The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

## STATEMENT OF THE CASE

Although its cargo was delivered undamaged, respondent, Hughes Drilling Fluids, filed (1) an *In Personam* Complaint, alleging "anticipated" damage to a cargo of barite ore carried aboard the M/V LUO FU SHAN, a Chinese flag vessel owned by petitioner, an agency of the Chinese Government; and (2) an action for declaratory judgment, based on alleged diversity jurisdiction, seeking to be exonerated from contribution in general average.

The cargo of barite ore was loaded aboard petitioner's vessel at Zhanjing, People's Republic of China, and was purchased by respondent while the vessel was in transit from China to the United States. Two clean onboard bills of lading were issued to respondent. Both of them contained the forum selection clause and a local clause, making them subject to COGSA.[1]

On her voyage to the United States Gulf, the M/V LUO FU SHAN encountered heavy seas and sustained damage which necessitated a deviation to Guam for temporary repairs and subsequent return to China for permanent repairs. Petitioner declared general average and appointed the China Council for the Promotion of International Trade as Average Adjusters pursuant to Clause 24(1) in the bills of lading:

> (1) General Average shall be adjusted in Beijing in accordance with China Council for Promotion

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1 Clause 27. Local Clause.

With respect to the goods carried to or from the United States of America, notwithstanding any other term hereof this Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, 1936. . . .

of International Trade Provisional Rules for General Average Adjustment, 1975.

Respondent posted a Lloyd's Average Bond, and petitioner transshipped the cargo to New Orleans aboard another vessel. The cargo arrived undamaged, and respondent subsequently abandoned its admiralty claim for "anticipated" cargo damage.

Petitioner filed an answer to respondent's diversity action in which it denied jurisdiction over its person. Thereafter, and without waiving its objections to *in personam* jurisdiction, petitioner brought a Motion to Dismiss, asserting, *inter alia*, that the general average dispute should be determined by arbitration in the People's Republic of China pursuant to the forum selection clause[2] in the bill of lading, and, alternatively, that respondent's declaratory judgment action should be dismissed on the basis of *forum non conveniens*.

The District Court granted petitioner's Motion to Dismiss on June 17, 1987, holding that the forum selection clauses contained in the bills of lading were valid and enforceable. The Court did not reach the issues of personal jurisdiction[3] or *forum non conveniens*. Respondent appealed to the Fifth Circuit Court of Appeals on August 12, 1987.

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2 Clause 2. Jurisdiction
All disputes arising or in connection with this Bill of Lading shall be determined by Chinese law in the Court of, or by arbitration in, the People's Republic of China.

3 Although this issue has not been decided and petitioner continues to contest personal jurisdiction, petitioner must seek redress from the Fifth Circuit decision now or be faced with *res judicata* on the issue of the reasonableness of the forum selection clause.

In January, 1988, petitioner commenced arbitration proceedings in China to which respondent objected and in which it refused to participate. On March 18, 1988, respondent filed a Motion to Stay the Trial Court's judgment and to enjoin arbitration proceedings. The motion was granted without written reasons by the trial court on March 29, 1988. Petitioner's appeal to the Fifth Circuit to vacate or suspend the injunction was likewise denied without written reasons on May 13, 1988.

On August 22, 1988, the Fifth Circuit Court of Appeals reversed the trial court's judgment holding that forum selection clauses in bills of lading subject to the Carriage of Goods by Sea Act (COGSA)[4] are invalid not only in cargo damage cases, but also in cases limited to general average disputes.

## REASONS FOR GRANTING THE WRIT

### 1.

### The Decision of The Court of Appeals, Holding a Forum Selection Clause Requiring Litigation or Arbitration of a General Average Dispute in a Non-U.S. Forum to be Invalid *per se*, is Contrary to 46 U.S.C. §1303(8) And Violates The Basic Tenets of *M/S BREMEN v. Zapata Offshore Company*, 407 U.S. 1 (1972).

The validity of forum selection clauses as related to *in personam* actions was argued before this Court in the *S/S MONROSA v. Carbon Black Export*,

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4 46 U.S.C. §§1301-1315 (1982).

359 U.S. 180 (1959), almost thirty years ago. Four of the justices, in dissenting from the decision, expressed concern that the majority's failure to address the issue would serve only:

> "to leave the lower federal courts in confusion and uncertainty and to make it necessary for us to mortgage our future and constantly mounting calendars with a question which we could and should decide today." *Id.* at 727.

Their concern proved to be correct. At present, there is utter confusion as to whether forum selection clauses requiring litigation or arbitration in a non-U.S. forum are (1) invalid *per se*,[5] (2) invalid only if unreasonable,[6] or (3) presumptively valid if limited to arbitration as opposed to adjudication.[7] This confusion is compounded by the fact that the very courts which hold forum selection clauses to be invalid *per se*, permit a dismissal or transfer of the case to a non-U.S.

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5 *Hughes Drilling Fluids v. M/V LUO FU SHAN*, 852 F.2d 840 (5th Cir. 1988); *Conklin & Garrett, Ltd. v. M/V FINNROSE*, 826 F.2d 1441 (5th Cir. 1987); *Union Insurance Society of Canton, Ltd. v. S/S ELIKON*, 642 F.2d 721 (4th Cir. 1981); *Indussa Corp. v. S/S RANBORG*, 377 F.2d 200 (2d Cir. 1967); *Carbon Black Export, Inc. v. The MONROSA*, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959).

6 Decisions from the district courts of the First and Eleventh Circuits have directly addressed the issue, although the Courts of Appeals have not. *Aetna Insurance Co. v. The SATRUSTEGUI*, 171 F. Supp. 33, *vacated other grounds*, 174 F.Supp. 934 (D.P.R. 1959); *Schuster Naval Stores Co. v. Ozean/Stinnes Lines*, 1962 A.M.C. 999 (S.D. Ga. 1961).

7 *State Establishment for Agricultural Product Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (11th Cir. 1988), *cert. denied* 57 U.S.L.W. 3277 (U.S. Oct. 18, 1988).

tribunal on grounds of *forum non conveniens*.[8] The Fifth Circuit is among those courts which have adopted this inconsistent approach.[9]

The forum selection clause in the instant case was invalidated based upon the premise that litigation or arbitration of a general average dispute in China necessarily "tend[ed] to lessen the carrier's liability" and was, therefore, "unlawful" under COGSA. The premise relied on by the Fifth Circuit was thoroughly discredited by this Court in *M/S BREMEN v. Zapata Offshore* Co., 407 U.S. 1 (1972), when it held that:

> "the argument that [forum selection clauses] are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigal legal fiction. It appears to rest at core on historical resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses, once essentially local, now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. . . . In light of present-day commercial realities and expanding international trade we

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8 *Union Insurance Society of Canton, Ltd. v. S/S ELIKON*, 642 F.2d 721 (4th Cir. 1981); *Indussa Corp. v. S/S RANBORG*, 377 F.2d 200 (2d Cir. 1967).

9 *Conklin & Garrett, Ltd. v. M/V FINNROSE*, 826 F.2d 1441 (5th Cir. 1987).

> conclude that the forum clause should control absent a strong showing that it be set aside." *BREMEN*, 407 U.S. at 12, 15.

Although the *BREMEN* case did not involve a COGSA bill of lading or general average dispute, its rationale, i.e., that forum selection clauses in the area of international trade are presumptively valid unless shown to be unreasonable, is equally applicable to this controversy.

The Fifth Circuit's decision reflects the "provincial attitude regarding the fairness of other tribunals," decried in the *BREMEN* case, and is contrary to the explicit language and legislative history of COGSA. The pertinent part of 46 U.S.C. §1303(8) provides that:

> "Any clause, covenant, or agreement in a contract or carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or *lessening such liability* otherwise than as provided in this chapter, shall be null and void and of no effect." (Emphasis supplied).

This case involves neither "loss or damage to . . . goods" nor a "carrier's liability". Rather, it involves the liability of respondent, the owner of the cargo, to contribute to the general average expenditures made for the benefit of its cargo. Consequently, since 46 U.S.C. §1303(8) by its very language is not even

applicable to this general average dispute, obviously it affords no basis for invalidating the forum selection clause.

Even if it were applicable, the test to be applied under §1303(8) is whether the clause lessens the carrier's liability, not whether it "tends" to lessen it, as was held by the Fifth Circuit. Thus, 46 U.S.C. §1303(8) requires an analysis as to whether any given clause does, in fact, "lessen the carrier's liability", which analysis is not satisfied by reverting to the outdated cliche' that dispute resolution in the foreign carrier's forum would inevitably "tend" to lessen the carrier's liability.

The analysis required under §1303(8)[10] is the identical analysis required to determine dismissal or transfer under *forum non conveniens*.[11] Whether the facts in the instant case are analyzed under *BREMEN*, 46 U.S.C. §1303(8) or under *forum non conveniens*, the result should be the same, namely, that arbitration in China is reasonable in that it is the most convenient forum because:

(1) The LUO FU SHAN is owned by an arm of the Chinese government and its operations are directed from Guangzhou. The records of the company relating to the vessel and its cargo are located in China;

(2) The vessel's crew is Chinese, all of whom reside in China;

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10 *Aetna Insurance Co. v. The SATRUSTEGUI, supra*; *Schuster Naval Stores Co. v. Ocean/Stinnes Lines, supra.*

11 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *In Re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. *en banc* 1987).

(3) The LUO FU SHAN has never come to the Eastern District of Louisiana since the incident in question;

(4) All permanent repairs were made in China, including surveys prior thereto. Thus, all the evidence regarding surveys and repairs made before the voyage and following its return from Guam are in China;

(5) Petitioner has the burden of showing it used due diligence to make the LUO FU SHAN seaworthy when the cargo was loaded in China. All the testimony in connection with petitioner's efforts will come from the vessel's crew in China, its records in China and its Chinese surveyors;

(6) General average was declared in China and the general average adjustment prepared in China. Accordingly, all documentation in connection with the adjustment is in China. To require petitioner to adjudicate respondent's liability for contribution to general average in an American court, thousands of miles from the source of all evidence necessary to the case, would not only be unreasonable, but also unfair considering that the general average expenditures resulted from petitioner's successful actions in saving respondent's cargo and delivering it in undamaged condition.

Not only is the Fifth Circuit's decision contrary to the express language of COGSA, it also ignores its legislative history. When considering the bill which resulted in the passage of COGSA, Congress sought to achieve substantial uniformity with similar acts of other major maritime nations. In fact, the acts of other countries were scrutinized so closely that even

clerical errors were corrected.[12] Only the Australian and Canadian acts had provisions at that time invalidating forum selection clauses. Canada was in the process of repealing that provision and subsequently did so. Consequently, it stands to reason that Congress, had it intended to outlaw forum selection clauses, would have done so by incorporating a specific provision invalidating agreements to adjudicate claims in courts outside the United States.

In sum, neither 46 U.S.C. 1303(8) nor the legislative history of COGSA support the Fifth Circuit's decision to mandate adjudication of this general average dispute in a U.S. Court.

## 2.

## The Forum Selection Clause is a Lawful Provision Regarding General Average Within the Meaning of 46 U.S.C. §1305.

Section 5 of COGSA specifically provides that "[n]othing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average." The general average provision in the bills of lading issued by petitioner contain the presently used New Jason clause, which is considered to be a "lawful provision" within the meaning of Section 5. *See* G. Gilmore & C. Black, *The Law of Admiralty*, 268 (2d ed. 1975).

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12 *See* S. Rep. No. 742, 74th Congress, 1st Sess. (1935), Hearings Before The Senate Commerce Committee on S.1152, a bill relating to Carriage of Goods by Sea, 74th Cong. 1st Sess. 1935. p. 3.

There is no authority in COGSA or otherwise supporting the Fifth Circuit's decision that a clause permitting arbitration of a general average dispute in a non-U.S. forum is not "lawful". The court's decision was based squarely on the untenable premise that only a U.S. court can mete out justice in a dispute limited to general average, an ancient maritime doctrine providing for the proportionate sharing between vessel owner and cargo owners of the vessel's expenditures to save cargo. *The Star of Hope*, 76 U.S. (9 Wall.) 203 (1869).

The invalidation of the forum selection clause without any inquiry as to whether it was "reasonable" or "lawful" or did, in fact, "lessen the carrier's liability" is contrary to the dictates of *BREMEN* and COGSA and reflects an unseemly bias against foreign carriers involved in international commercial disputes with U.S. shippers, a bias soundly rejected by this Court: "We cannot have our trade and commerce in world markets and international waters exclusively on our terms, governed by our law, and resolved in our courts." *BREMEN* at 9.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

**HUGHES DRILLING FLUIDS,**
**Plaintiff-Appellant,**

**v.**

**M/V LUO FU SHAN, its engines, tackle, apparel, etc., et al.**
**Defendants-Appellees.**

**No. 87-3607.**

United States Court of Appeals,
Fifth Circuit.

Aug. 22, 1988.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, WILLIAMS, and DAVIS, Circuit Judges:

W. EUGENE DAVIS, Circuit Judge:

Hughes Drilling Fluids (Hughes), the owner of cargo aboard the defendant's vessel, appeals the dismissal of its suit for declaratory judgment seeking a declaration of its general average obligation. The district court concluded that the forum selected in the bill of lading, the Republic of China, was binding on the parties and dismissed the suit. We conclude that the forum selection clause conflicts with the Carriage of Goods by Sea Act (COGSA) and reverse.

I.

The motor vessel LUO FU SHAN owned by defendant-appellee, Guangzhou Maritime Transport Bureau of China (Guangzhou), was damaged in a storm and her cargo contaminated while on a voyage from the vessel's home port, Zhanjiang, People's Republic of China, to the United States. Before the casualty, Hughes purchased from Guangzhou a portion of the LUO FU SHAN's cargo of bulk barite and received bills of lading covering the barite it purchased.

Following the casualty, the vessel diverted to Guam for temporary repairs and then returned to Zhanjiang for permanent repairs. Guangzhou later declared general average, which was submitted to a Chinese agency for arbitration. That agency assessed Hughes' contribution at $452,200.75. Hughes posted a bond to cover its possible obligations under the general average assessment and shipped its barite on another vessel.

Before the Chinese agency assessed Hughes' general average contribution, Hughes had filed this suit in the Eastern District of Louisiana against Guangzhou and the LUO FU SHAN. At the time the action was filed, Hughes sought damages for the cargo contamination it understood had occurred and also sought a declaratory judgment that it owed no general average contribution because the LUO FU SHAN was unseaworthy. When the barite arrived in New Orleans, however, Hughes discovered that the cargo was undamaged. Consequently, Hughes dismissed its claim for cargo damage but continued to assert its declaratory judgment action. In reponse to a motion by appellee, the district court dismissed Hughes' declaratory judgment action for lack of jurisdiction. The court found enforceable the clause of the bill of lading that specified the People's Republic of China as the forum for any dispute that arose over the shipment.

In this appeal Hughes contends, as it did in the district court, that the forum selection clause is unenforceable because it lessens the carrier's liability to the cargo owner in violation of the Carriage of Goods by Sea Act (COGSA).

II.

The question presented in this case is whether a clause in a bill of lading choosing the carrier's home forum conflicts with COGSA when a dispute arises between the carrier and the cargo owner over general average.

The district court concluded that *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) required it to give effect to the forum selected by the parties in the bill of lading.

In *Bremen*, a German corporation contracted to tow a drilling rig from Venice, Louisiana, to a point off Ravenna, Italy, in the Adriatic Sea. The contract was freely negotiated in an arms length transaction. The forum selected, England, was a compromise, neutral forum rather than the home of one of the parties. Perhaps most important, the Supreme Court carefully noted that COGSA was not applicable to the case. 407 U.S. at 10, n.11, 92 S.Ct. at 1913 n.11.

In *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987) we considered whether *Bremen* required enforcement of a forum selection clause in a cargo damage case. The owner of cargo damaged during shipment from the United Kingdom to Port Everglades, Florida, on the FINNROSE sued to recover for that damage. The bill of lading under which the cargo was shipped contained a forum selection clause that required any dispute arising under the bill to be decided in Finland according to Finnish

law. After a thorough review of the authorities, we found it entirely unrealistic to believe that no reduction in the carrier's liability occurred if the cargo owner were required to sue the carrier for damaged cargo in a foreign forum. Because COGSA does not permit the parties to contract out of its terms if such a contract diminishes the shipowner's liability, we concluded that the shipowner could not enforce the forum selection clause. We held that *Bremen* "'controls the field of admiralty to the extent that no federal legislation to the contrary is on the books.' We hold that in this case COGSA is applicable and controlling." *M/V FINNROSE*, 826 F.2d at 1442 (quoting Nadelman, Choice-of-Court Clauses in the United States, 21 Am.J. Comp.L. 124, 134 (1973)).

If, in the present case, the dispute between Hughes and Guangzhou related to cargo damage rather than general average *FINNROSE* would be indistinguishable and we would not enforce the forum selection clause. Guangzhou does not seriously dispute this conclusion. It argues, however, that Hughes' action for a declaratory judgment seeking a declaration of Hughes' obligation for general average requires a different result.

The question for decision therefore narrows to whether we should reach a conclusion in this case contrary to the one we reached in *FINNROSE* because the controversy relates to general average rather than cargo damage. The answer depends upon whether COGSA applies to a controversy over general average. If it does, our reasoning in *FINNROSE* applies to this case and renders the forum selection clause unenforceable. For reasons set forth below, it is clear to us that COGSA does apply to a general average claim.

First, COGSA applies by its own terms. The act provides in part that "[n]othing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average." 46 U.S.C. App. §1305. (emphasis added) Gilmore & Black in their well-known *Law of Admiralty* conclude that "the word 'lawful' undoubtedly has some force." Gilmore & Black at 268. They suggest that COGSA prevents carriers from expanding their right to general average beyond their immunity under COGSA from cargo damage actions by shippers. Gilmore & Black at 268.

Finally, this circuit has expressly held that "general average concepts ... have been made subject to the Carriage of Goods by Sea Act ..." *Orient Mid-East Lines, Inc. v. A Shipment of Rice onboard S/S ORIENT TRANSPORTER*, 496 F.2d 1032, 1035 (5th Cir. 1974). *See also Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321, 1330 (5th Cir. 1987).

The forum selection clause that requires the parties to the bill of lading issued in this case to litigate their disputes in The People's Republic of China favors carriers. It tends to lessen the carrier's liability. *See FINNROSE*, 826 F.2d at 1443-44; Gilmore & Black at 268. This violates COGSA. Just as carriers may not enforce a forum selection clause in a cargo damage case that requires litigation in a foreign forum, they may not enforce such a clause in a controversy relating to general average.

For reasons advanced above, the judgment of the district court is reversed and the case is remanded for further proceedings.

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | | |
|---|---|---|
| HUGHES DRILLING FLUIDS | * | CIVIL ACTION |
| VERSUS | * | NO. 86-1844 |
| M/V LUO FU SHAN, ETC. | * | SECTION:"E"(2) |

§§§§§§§§§§§§

MEMORANDUM OPINION AND ORDER

This matter is before the Court on motion for summary judgment of defendant Guangzhou Maritime Transport Bureau of China ("Guangzhou"). It is the position of Guangzhou that this general average dispute is subject to the choice of forum clauses in the pertinent bills of lading. Guangzhou urges the Court to enforce these clauses and decline to exercise jurisdiction. We find merit in Guangzhou's argument.

Preliminarily, we note that summary judgment is an appropriate procedural vehicle to assess the enforceability of a forum selection clause. *Grissom v. Colotti*, 644 F.Supp. 903, 904 (D. Puerto Rico 1986).

It appears that the bills of lading at issue provide: "All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of or by arbitration in the People's

Republic of China." R.D. 9, Exhibit B (erroneously marked "Exhibit A" in the record), at 5, clause 2. The document further specifies: "General Average shall be adjusted in Beijing in accordance with China Council for the Promotion of International Trade Provisional Rules for General Average Adjustment, 1975." *Id.* clause 24. There is no factual dispute about the existence or content of these provisions.

Of course, the Supreme Court has held, precisely in the context of an international admiralty dispute, that forum selection clauses must be strictly enforced, unless the opponent of enforcement can meet the weighty burden of showing that the agreement was affected by fraud, undue influence, overweening bargaining power, or that it violates public policy. *M/V Breman v. Zapata Offshore Co.*, 407 U.S. 1, 11-15, 92 S.Ct. 1907, 1913-15, 32 L.Ed.2d 513 (1972).

Plaintiff Hughes Drilling Fluids opposes the enforcement of the forum selection clause: (1) because China is an inconvenient forum; (2) because the surveyors hired by Hughes were denied access to the M/V Luo Fu Shan when it returned to China to be repaired; (3) because Chinese law alone cannot resolve this dispute inasmuch as (a) the bill of lading stipulates, in clause 27, the applicability of COGSA to goods carried to or from the United States, (b) China has no jurisdiction over Hughes or its insurer, (c) the bill of lading in clause 24 does not provide that Chinese law will govern the question of liability for general average, but only the adjustment thereof.

We observe that plaintiff does not even allege, let alone demonstrate, the existence of factors contemplated by *Bremen* as sufficient to warrant a court's refusal to enforce a choice of forum clause. We reject plaintiff's arguments that we have sketched

above: (1) because far from establishing China as an inconvenient forum, the balancing of public and private interests necessary to determine *forum non conveniens* questions weighs in favor of a Chinese forum, *See Schexnayder v. McDermott International, Inc.*, ___ F.2d __ (5th Cir. Slip Op. May 29, 1987); *See Also Pacific Emp. Ins. Co. v. M/V Capt. W.V. Cargill*, 751 F.2d 801, 804-06 (5th Cir. 1985); (2) because we note that plaintiff's surveyors' alleged inability to examine the ship before its repairs is precisely the sort of dispute arising out of the adjustment of general average which the bill of lading doubly subjects to Chinese jurisdiction, under clauses 2 and 24, an that in any case it does not constitute fraud or overweening bargaining power affecting the agreement itself and its choice of forum clauses, *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 2457 n.14, 41L.Ed.2d 270 (1974); (3) because Chinese courts, according to the exhibits submitted by plaintiff and defendants, honor and apply any contractual choice of law provisions between litigants (such as Clause 27's stipulation of COGSA, so that whereas Chinese law governs the adjustment of general average, under the bill of lading it is expressly contemplated that Chinese courts will apply COGSA where pertinent, as for example, to the question of liability for general average); further because Chinese jurisdiction has been acceded to by plaintiff by virtue of clause 2. Plaintiff's other arguments are egregiously unmeritorious.

For these reasons, we decline to exercise jurisdiction herein and instead give force to the forum selection clauses in the bill of lading, which make it unnecessary for us to reach defendant's alternative argument that Louisiana is an inconvenient forum.

Accordingly, the motion of Guangzhou for summary judgment should be, and the same is hereby GRANTED dismissing plaintiff's suit at plaintiff's cost.

New Orleans, Louisiana, this 17th day of June, 1987.

/s/ Marcel Livaudais, Jr.
UNITED STATES DISTRICT JUDGE

(2)

NO. 88-777

Supreme Court, U.S.
FILED
JAN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1988

GUANGZHOU MARITIME
TRANSPORT BUREAU OF CHINA,
*Petitioner*

v.

HUGHES DRILLING FLUIDS,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENT HUGHES DRILLING FLUIDS IN OPPOSITION

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21 pp

## QUESTION PRESENTED

Whether this Court should exercise its discretionary jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit that a forum selection clause stipulating the carrier's home forum in a preprinted form bill of lading governed by the Carriage of Goods by Sea Act is unenforceable in a claim for a contribution to general average by a shipowner against a cargo owner.

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## REPORT OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 852 F.2d 840 (5th Cir. 1988). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 1988 A.M.C. 82 (E.D. La. 1987).

## STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under 28 U.S.C. §1254.

## STATEMENT OF STATUTES INVOLVED

46 U.S.C. §§1301-1315, Carriage of Goods by Sea Act.

> 46 U.S.C. §1303(8). Limitation of liability for negligence.
>
> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or a similar clause, shall be deemed to be a clause relieving the carrier from liability.
>
> 46 U.S.C. §1305. Surrender of right; increase of liability; charter party; general average.
>
> A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the chapter, provided such

surrender or increase shall be embodied in the bill of lading to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

## STATEMENT OF THE CASE

Respondent, Hughes Drilling Fluids (Hughes), is a Delaware partnership with its principal place of business in Texas. Petitioner, Guangzhou Maritime Transport Bureau of China (Guangzhou), is a government agency of the People's Republic of China and is the owner and operator of the M/V LUO FU SHAN, a bulk carrier built in 1968.

On December 8, 1985, after loading barite and bauxite ore aboard the M/V LUO FU SHAN, petitioner issued clean onboard order bills of lading for delivery of the ore in the U.S. Gulf. While the vessel was in transit, Hughes purchased the barite from Unibar Corporation, a cargo broker in Houston, Texas.[1] The bills of lading are pre-printed forms containing the following provisions:

2. JURISDICTION. All disputes arising under or in connection with this Bill of Lading shall be determined by Chinese Law in the courts of, or by arbitration in the People's Republic of China.

24. GENERAL AVERAGE AND NEW JASON CLAUSE. (1) General average shall be

---

[1] The Fifth Circuit opinion mistakenly reported that Hughes purchased the cargo from Guangzhou. *Hughes Drilling Fluids v. M/V LUO FU SHAN*, 852 F.2d 840 (5th Cir. 1988).

adjusted in Beijing in accordance with China Council for the Promotion of International Trade Provisional Rules for General Average Adjustment, 1975.

(2) In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever whether due to negligence or not, for which, or for the consequence of which the Carrier is not responsible, by statute, contract or otherwise, the goods, Shippers, Consignees, or Owners of the goods shall contribute with the Carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods.

27. LOCAL CLAUSE. With respect to the goods carried to or from the United States of America, notwithstanding any other term hereof this Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, 1936.

Two weeks into the voyage and after encountering normal winter weather, the M/V LUO FU SHAN suffered hull damage causing sea water contamination of its cargo and compelling deviation to Guam, the nearest port. After two separate surveys and inspection by the United States Coast Guard in Guam, the Coast Guard would not permit the vessel to continue to the United States without permanent repairs. When the vessel returned to China, petitioner declared general average, respondent posted a bond in New York to obtain its cargo, and petitioner transshipped the cargo on its vessel, the M/V DING HU SHAN.

After learning the cargo was wetted by sea water, respondent filed an *in rem* and *in personam* Complaint for Cargo Damage and Declaratory Judgment on April 30, 1986, preparing to seize the vessel when she arrived in New Orleans. Respondent withheld seizure after learning petitioner was an agency of the Chinese government. Although the cargo was wetted, subsequent surveys determined the cargo was within specification and respondent did not pursue its cargo claim, leaving only the declaratory judgment action that it did not owe a contribution in general average.

After minimal discovery, petitioner moved for summary judgment to dismiss plaintiff's complaint as an impermissible anticipatory declaratory judgment action and on the basis of forum non conveniens. On June 16, 1987, relying on neither ground, the district court ordered dismissal of respondent's complaint, holding the forum selection clause was enforceable on the authority of *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

On August 22, 1988, the United States Court of Appeals for the Fifth Circuit reversed the district court, holding the clause unilaterally selecting the law and forum of the People's Republic of China in a bill of lading subject to the Carriage of Goods by Sea Act is unenforceable in a general average dispute, and *BREMEN* was inapposite.

## SUMMARY OF ARGUMENT

The federal circuit courts of appeals unanimously hold forum selection clauses in bills of lading governed by the Carriage of Goods by Sea Act (COGSA) are unenforceable because such clauses lessen the carrier's liability in violation of §1303(8) of the act. A clause requiring a cargo owner to bring suit in a foreign forum makes it more

difficult and expensive for a cargo owner to recover, and thus easier for a carrier to obtain a more favorable settlement. Additionally, misinterpretation of COGSA by a foreign forum to the detriment of the cargo owner would certainly lessen the carrier's liability.

No decision of this Court conflicts with the decision of the Fifth Circuit Court of Appeals. *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) is inapposite because that case involved a negotiated contract selecting a neutral and experienced forum, and importantly, COGSA did not apply to the contract.

With respect to the invalidity of a forum selection clause in a general average dispute, COGSA permits only lawful general average provisions, and under COGSA a forum selection clause is not a lawful provision.

## ARGUMENT

The relevant considerations justifying this Court's exercise of its discretionary jurisdiction are not present in this case. Contrary to petitioner's contentions, there is no conflict among the federal courts of appeals regarding the enforceability of a forum selection clause in a bill of lading and no federal court of appeals has decided the issue in conflict with this Court. S.Ct. R. 17.1.

### 1. THE FEDERAL COURTS OF APPEALS UNIFORMLY INVALIDATE FORUM SELECTION CLAUSES IN BILLS OF LADING GOVERNED BY THE CARRIAGE OF GOODS BY SEA ACT.

Petitioner erroneously asserts there is "utter confusion" among the courts as to the validity of a forum

selection clause in a bill of lading. Every federal court of appeals presented with a forum selection clause in a bill of lading has held the clause violated COGSA. The Second Circuit, Judge Friendly for the *en banc* court, first nullified such a clause as contrary to COGSA in *Indussa Corp. v. S. S. RANBORG,* 377 F.2d 200 (2d Cir. 1967), specifically overruling the circuit's 1955 decision enforcing a forum selection clause, *Wm. H. Muller & Co. v. Swedish American Line, Ltd.,* 224 F.2d 806 (2d Cir. 1955). Applying now familiar reasoning, Judge Friendly found a forum selection clause contravenes §3(8) of COGSA, which prohibits a carrier from lessening its liability in a contract of carriage subject to COGSA.

> From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts 'a high hurdle' in the way of enforcing liability, Gilmore & Black, supra 125 n.23, and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum.
>
> ...A clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court and §3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability.

*Indussa*, 377 F.2d at 203-204. The court held "Congress outlawed clauses prohibiting American courts from deciding causes otherwise properly before them." *Id.* at 204.

The Fourth Circuit Court of Appeals also refused to enforce a forum selection clause in a bill of lading controlled by COGSA. *Union Insurance Society of Canton, Ltd. v. S.S. ELIKON*,642 F.2d 721 (4th Cir. 1981). The court approved the rationale of *Indussa* and distinguished *BREMEN*, decided after *Indussa*.

During the pendency of the appeal of the instant case, the Fifth Circuit Court of Appeals decided *Conklin & Garrett, Ltd. v. M/V FINNROSE*, 826 F.2d 1441 (5th Cir. 1987) and invalidated a forum selection clause in a bill of lading governed by COGSA. The court followed *Indussa*, noted the identical result reached in *Union Insurance* and agreed the general policy permitting parties to choose a forum should recede before the specific policy enunciated in COGSA. The court recognized COGSA attempted to balance the inequities between the cargo owner and carrier and wrote "It is entirely unrealistic to look to an obligation to sue overseas as not 'lessening' the liability of the carrier."826 F.2d at 1444, quoting G. Gilmore & C. Black, *The Law of Admiralty*, 146 n.23 (1975). The Fifth Circuit opinion concluded the district court erred in refusing jurisdiction based on COGSA and the jurisprudence, and held *BREMEN* was inapposite.

In the instant case, the Fifth Circuit found *FINNROSE* to be indistinguishable, and applied its holding in that case:

> After a thorough review of the authorities, we found it entirely unrealistic to believe that no

> reduction in the carrier's liability occurred if the cargo owners were required to sue the carrier for damaged cargo in a foreign forum. Because COGSA does not permit the parties to contract out of its terms if such a contract diminishes the shipowner's liability, we concluded that the shipowner could not enforce the forum selection clause. We held that *Bremen* 'controls the field of admiralty to the extent that no federal legislation to the contrary is on the books. We hold that in this case COGSA is applicable and controlling.' M/V FINNROSE, 826 F.2d at 1442 (citation omitted).

*Hughes Drilling Fluids v. M/V LUO FU SHAN,* 852 F.2d 840, 841 (5th Cir. 1988). The only question on appeal, therefore, was whether a forum selection clause in a bill of lading governed by COGSA was unenforceable in a general average dispute just as it is in a claim for cargo damage, and the court held that it was.

Most recently, the Court of Appeals for the Eleventh Circuit joined the Second, Fourth and Fifth Circuits and refused to enforce a clause in a bill of lading requiring an Iraqi cargo owner to arbitrate in London, England, a foreign forum, because the clause would "conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability." *State Establishment for Agricultural Product Trading v. M/V WESERMUNDE,* 838 F.2d. 1576, 1581, cert. denied, 57 U.S.L.W. 3277 (U.S. Oct. 18, 1988). The court specifically held that arbitration per se does not violate COGSA, but requiring arbitration in a foreign forum does.

In the only other federal circuit to consider enforcement of a forum selection clause in a bill of lading, the Court of Appeals for the Ninth Circuit held that if COGSA

does not apply of its own force to a contract of carriage, but the parties contractually agree to be governed by COGSA, they may also validly agree on a foreign forum for dispute resolution. *North River Ins. Co. v. Fed Sea/Fed Pac Line,* 647 F.2d 985 (9th Cir. 1981). That court relied on the principle that a contract of carriage outside the scope of COGSA may incorporate, by agreement, terms inconsistent with COGSA. The Ninth Circuit limited its holding to the facts and carefully distinguished *Indussa* and *Union Insurance.*

The facts giving rise to the *North River* distinction are not present in the instant case because COGSA applies to the bill of lading both by its statutory provisions[2] and by Clause 27 of the bill of lading making the carriage subject to COGSA. *North River* does not address the enforceability of a forum selection clause in a bill of lading to which COGSA applies of its own force.

In its attempt to support its claim of "utter confusion" in the federal courts, petitioner cites two district court opinions decided in 1959 and 1961, *Aetna Ins. Co. v. The SATRUSTEGUI,* 171 F.Supp. 33 (D.P.R. 1959) and *Schuster Naval Stores Co. v. Ozean/Stinnes Lines,* 1962 AMC 999 (S.D. Ga. 1961). Both decisions relied on *Muller* in holding that forum selection clauses are enforceable if not unreasonable or violative of public policy. The Second Circuit expressly overruled *Muller,* and both district court cases arise out of districts now within the Eleventh Circuit and are implicitly overruled by *WESERMUNDE.* These two district court cases clearly do not supply the conflict necessary to support this Court's discretionary jurisdiction.

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[2]46 U.S.C. §1300 provides in part "Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter."

In a second inappropriate attempt to create the appearance of confusion among the circuits, petitioner cites *WESERMUNDE* for the proposition that forum selection clauses are presumptively valid if limited to arbitration as opposed to adjudication. This is a misleading statement of the court's holding. The *WESERMUNDE* court had before it only the validity of an arbitration clause specifying a foreign forum - at no point did the court indicate the possibility of a different result if adjudication, not arbitration, were at stake. In fact, the Eleventh Circuit relied on both *Indussa* and *Union Insurance*. *WESERMUNDE* is entirely consistent with *Indussa*, *Union Insurance*, *FINNROSE*, and the decision of the Court of Appeals for the Fifth Circuit in the instant case.

## 2. THERE IS NO CONFLICT BETWEEN THE HOLDING IN THE INSTANT CASE AND DECISIONS OF THE UNITED STATES SUPREME COURT.

*BREMEN*, enforcing a forum selection clause in a maritime towage contract is distinguishable from the instant case in several important respects. In *BREMEN* (1) the towage contract was open to bid and then actively negotiated between two experienced parties, in contrast to the printed form order bill of lading in this case mailed to the broker and then mailed to respondent, which was unaware of the forum selection clause; (2) the American rig owner and German tug operator in *BREMEN* chose England as a compromise neutral forum, as opposed to petitioner's unilateral imposition of its inexperienced home forum; and (3) *BREMEN* itself distinguished *Indussa* because COGSA did not govern the towage contract before

the court.[3] In *BREMEN* this Court saw no reason to invalidate a freely negotiated forum selection clause selecting a neutral forum with admiralty experience. However, those are not the facts of this case.

In the instant case, the bill of lading is a contract of adhesion, issued by Guangzhou designating the consignee as "to order" and the party to be notified as Unibar Corporation, the broker from whom Hughes purchased the cargo in transit. Neither Unibar nor respondent knew the bill of lading contained a forum selection clause, and thus did not agree to arbitrate all disputes in China or use the new Chinese courts. Petitioner unilaterally imposed on respondent its own home forum, a non-neutral forum with no expertise in admiralty matters.[4]

Petitioner attempts to create a conflict between the Fifth Circuit's decision in this case and *BREMEN* by attributing the Fifth Circuit's invalidation of the forum selection clause to provincialism. To the contrary, the Second, Fourth, Fifth and Eleventh Circuits invalidated forum selection clauses in bills of lading governed by COGSA because (1) from a practical standpoint it is more difficult for an American cargo owner to sue in a foreign forum, particularly where the claim is small; (2) the foreign forum may not apply COGSA; (3) even if the foreign forum applies

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[3] "The *Muller* case was overruled in *Indussa Corp. v. S.S. RANBORG*, 377 F.2d 200 (CA2 1967), insofar as it held that the forum clause was not inconsistent with the 'lessening of liability' provision of the Carriage of Goods By Sea Act, 46 U.S.C. §1303(8) which was applicable to the transactions in *Muller, Indussa* and *Carbon Black*. That Act is not applicable in this case." *BREMEN*, 407 U.S. at 10 n.11.

[4] Maritime courts in the People's Republic of China were formed only a few years ago, and the country does not have an established body of maritime law. *Zhunlai, Maritime Arbitration and Litigation in China*, The MLA Report No. 667, p. 8714 (February 10, 1987)(Record p. 247).

COGSA, it may not apply it in the same way and is not subject to the uniform control of this Court; and (4) the specific congressional policy prohibiting a carrier from lessening its liability conflicts with the general policy permitting freedom of contract.

Similarly, presented with the validity of a choice of law clause in a bill of lading governed by the Harter Act, this Court held the Act controlled. *Knott v. Botany Worsted Mills,* 179 U.S. 69 (1900). The bill of lading provided the contract would be governed by the law of the flag of the ship and exempted the carrier from negligent loading and stowage, a clause expressly nullified by the Harter Act. The cargo damage resulted from negligent stowage, the Harter Act applied by its own terms, and the Court held the Act "overrides and nullifies the stipulation of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag." 179 U.S. at 77. In this case, petitioner's bill of lading specified all disputes were to be resolved in China pursuant to Chinese law, the law of the ship's flag. *Knott* lends support to the principal at stake in the instant case, that Congress' statutory enactments may not be modified unilaterally by the carrier.

This Court has also held a forum selection clause is unenforceable in an *in rem* action against a vessel, *The MONROSA v. Carbon Black Export, Inc.,* 359 U.S. 180 (1959). Respondent filed an *in rem* and *in personam* complaint, but did not seize the vessel because it was owned by a government agency. In cargo damage claims, the cargo owner typically sues both *in rem* and *in personam,* and a different forum for the two actions contradicts the policy of joining all parties and claims arising out of the same occurrence in one action.

3. COGSA'S PROHIBITION AGAINST LESSENING THE CARRIER'S LIABILITY APPLIES IN A GENERAL AVERAGE DISPUTE.

The Fifth Circuit succinctly explained why §3(8) applies in a general average dispute.

> First, COGSA applies by its own terms. The Act provides in part that '[n]othing in this Act shall be held to prevent the insertion in a bill of lading of any *lawful* provision regarding General Average.' 46 U.S.C. App. §1305 (emphasis added).
> Gilmore & Black in their well-known *Law of Admiralty* conclude that "the word 'lawful' undoubtedly has some force." Gilmore & Black at 268. They suggest that COGSA prevents carriers from expanding their right to general average beyond their immunity under COGSA from cargo damage actions by shippers. Gilmore & Black at 268.

*LUO FU SHAN*, 852 F.2d at 842. As cited above, the Second, Fourth, Fifth and Eleventh Circuits unanimously invalidate a forum selection clause if it requires a foreign forum in a bill of lading governed by COGSA. Since COGSA permits only lawful clauses regarding general average, a clause not lawful under COGSA cannot be given effect in a general average dispute.

Jurisprudence considering general average cases holds COGSA is incorporated into general average disputes.

> Finally, this Circuit has expressly held that 'General average concepts. . . have been made subject to the Carriage of Goods by Sea Act. . . . *Orient Mid-East Lines, Inc. v. A. Shipment of*

> *Rice on Board S/S ORIENT TRANSPORTER*, 496 F.2d 1032, 1035 (5th Cir. 1974). See also *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321, 1330 (5th Cir. 1987).

*LUO FU SHAN*, 852 F.2d at 842. See also *Hellenic Lines, Ltd. v. Life Insurance Corp. of India*, 526 F.2d 830 (2d Cir. 1975).

Additionally, the general average clause contained in petitioner's bill of lading, the New Jason Clause (Clause 24(2) printed above), incorporates COGSA into any general average dispute. As explained by G. Gilmore and C. Black:

> This clause is, of course, so drafted as to take advantage of every immunity granted by Cogsa or by any other statute. In a general average case, the issue as to liability of the cargo to contribute may also, therefore, involve exactly the same questions as would have arisen had the case been one of cargo damage, for, under such a clause, the ship is entitled to recover general average expenses in just exactly the same cases as those in which it would have been immunized against cargo claims, had cargo been damaged.

G. Gilmore & C. Black, *The Law of Admiralty*, 267 (2d ed. 1975). Guangzhou, having written COGSA into its own bill of lading to avail itself of all of the benefits of COGSA with respect to its liability for cargo damage claims and its entitlement to general average contributions, cannot now avoid a provision in COGSA which is unfavorable to Guangzhou.

3. THE APPLICABILITY OF FORUM NON CONVENIENS IS NOT BEFORE THIS COURT.

In support of its argument, petitioner contends the courts of appeals which invalidate forum selection clauses may inconsistently permit dismissal to a foreign forum on the basis of forum non conveniens. Respondent agrees this may be inconsistent, however, the possible conflict between the statute and the judicially created doctrine is not before this Court. The district court did not dismiss respondent's complaint on the ground of forum non conveniens, therefore the Fifth Circuit Court of Appeals did not address the issue, and there is no conflict between COGSA and the doctrine of forum non conveniens before this Court.

Petitioner erroneously asserts "[t]he analysis required under §1303(8) is the identical analysis required to determine dismissal or transfer under forum non conveniens." This is a gross misstatement of the law. §3(8) requires an inquiry into whether a particular clause in a bill of lading "lessens the carrier's liability", an inquiry having nothing to do with forum non conveniens, which depends on an evaluation of public and private interest factors making litigation in one forum preferable to another. Petitioner's list of the forum non conveniens factors indicating China is a more reasonable forum is not only irrelevant, but is also a self serving and inaccurate statement of the important factors necessary to the forum non conveniens analysis in this case.

Finally, the doctrine of forum non conveniens presupposes an alternate forum which does not exist in this case. Respondent is not domiciled in China, it does not do business or own property there and it is not subject to jurisdiction in China. The only basis for jurisdiction over respondent in China is the forum selection clause contained in the bill of lading, a clause which all federal courts of appeals have declared invalid. This case is not appropriate for dismissal under forum non conveniens since there is no alternate forum.

## CONCLUSION

As this Court implied in the footnote in *BREMEN*, and held in *Knott*, when Congress legislates in the area of common carriage into and out of United States ports, as it has through COGSA and the Harter Act, our trade and commerce in world markets and international waters is governed by United States law and resolved in our courts. Considering the diminishing number of American flag carriers in international trade, United States shippers and importers will very seldom litigate their international commercial disputes in United States courts if foreign carriers are allowed unilateral selection of their forums for dispute resolution. Contrary to petitioner's claim of "utter confusion" in the federal courts and conflict with the philosophy expressed in *BREMEN*, there is no dispute in the federal courts in providing United States shippers and importers protection from foreign carriers' attempts to overcome the even application of COGSA under the supervision of this Court. The Petition for Writ of Certiorari should be denied as it was in *WESERMUNDE*.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

MOTION FILED
JAN 6 1989

No. 88-777 (3)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

GUANGZHOU MARITIME TRANSPORT BUREAU OF CHINA,
*Petitioner*,

—v.—

HUGHES DRILLING FLUIDS,
*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

**No. 88-777**

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GUANGZHOU MARITIME TRANSPORT BUREAU OF CHINA,

*Petitioner*,

—v.—

HUGHES DRILLING FLUIDS,

*Respondent*.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed by Guangzhou Maritime Transport Bureau of China. Petitioner has given consent to the MLA to file an *amicus* brief, but Repondent has refused to consent. Accordingly, leave to file must be sought pursuant to Rule 36.1.

## NATURE OF APPLICANT'S INTEREST

Applicant has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the eighty-nine years of its existence, has sponsored a wide range of legislation dealing with maritime matters including the Carriage of Goods by Sea Act ("COGSA")[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. §§ 1-14.

3 *E.g.*, Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-five national maritime law associations constituting the Comité Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on

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Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 *Benedict on Admiralty*, Doc. No. 3-4 at 3-34.1 to 3-78.2 (7th ed. 1988) (hereinafter "*Benedict*"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany (West Germany), Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Philippines, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 *Benedict*, Doc. No. 4-1 at 4-2 to 4-9; Ocean Bills of Lading (1924), 120 L.N.T.S. 155, *reprinted in* 6 *Benedict*, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), *reprinted in* 6 *Benedict*, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 *Benedict*, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), *reprinted in* 6A *Benedict*, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 *Benedict*, Doc. No. 6-3 at 6-22.103 to 6-76.1; and Limitation of Liability for Maritime Claims, *reprinted in* 6 *Benedict*, Doc. 5-4 at 5-32.1 to 5-44.2.

Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four briefs accepted by this Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The Fifth Circuit has construed COGSA in a way which may contravene the Federal Arbitration Act and may cause the United States to violate its international obligations to the People's Republic of China under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Moreover, the federal courts have reached differing conclusions about the enforceability of clauses in bills of lading which provide for resolution of disputes by arbitration in foreign forums. Accordingly, we urge that this motion be granted.

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6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

8 *Chick Kam Choo v. Exxon Corp.*, ____ U.S. ____, 108 S. Ct. 1684 100 L.Ed.2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

## MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, necessarily is different from those of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. MLA can comment objectively about the need for review by this Court in order to ensure national uniformity on the issues presented.

MLA was an active participant in the drafting and adoption of COGSA and the original Federal Arbitration Act, two of the pieces of legislation at issue. While the Petitioner has focused on the issue of the enforceability of forum selection clauses in general, MLA will concentrate only on clauses providing for arbitration abroad.

Dated: January 6, 1989.

Respectfully submitted,

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GUANGZHOU MARITIME TRANSPORT BUREAU OF CHINA,

*Petitioner*,

—v.—

HUGHES DRILLING FLUIDS,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Guangzhou Maritime Transport Bureau of China.

### QUESTION OF LAW PRESENTED

Whether a clause in a bill of lading providing for dispute resolution by arbitration abroad, which is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards, is unenforceable under section 1303(8) of the Carriage of Goods By Sea Act ("COGSA"), 46 U.S.C. §§ 1300-1315.

## INTEREST OF *AMICUS CURIAE*

This is stated in the Motion which precedes this Brief.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

The United States and China are parties to an international convention, implemented by a statute enacted more than thirty years after COGSA. Under both international law and U.S. domestic law, the former instruments would appear to take precedence over the latter.

It is becoming more common to include foreign arbitration clauses in ocean bills of lading. There is a pressing need for a definitive ruling about the enforceability of such clauses.

The persisting confusion over the scope of COGSA section 1303(8) makes it desirable that the Court finish the business it left undone in *Carbon Black Export, Inc. v. The Monrosa*, 359 U.S. 180 (1959).

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION OF THE FIFTH CIRCUIT MAY VIOLATE INTERNATIONAL LAW.

COGSA is the 1936 American version of the 1924 international convention known as the Hague Rules, 120 L.N.T.S. 155, *reprinted in* 6 *Benedict on Admiralty*, Doc. No. 1-1 at 1-2 to 1-19 (7th ed. 1988) (hereinafter "*Benedict*"), and applies "to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. § 1312. Although it permits a certain freedom of contracting out of its terms, 46 U.S.C. § 1305, COGSA expressly prohibits any agreement relieving the carrier of liability "or lessening such liability" as would otherwise arise from the Act. 46 U.S.C. § 1303(8).

General average is an ancient maritime practice for sharing expenses incurred in saving a vessel and its cargo from danger. G. Gilmore & C. Black, *The Law of Admiralty* §§ 5-1, 5-2 at 244-48 (2d ed. 1975) (hereinafter "Gilmore & Black"); L. Buglass, *Marine Insurance and General Average in The United States* 177 (2d ed. 1981); R. Lowndes & G. Rudolf, *General Average and the York Antwerp Rules* ¶ 31 at 15 (10th ed. 1975). COGSA expressly acknowledges that a bill of lading may contain a "lawful provision regarding general average." 46 U.S.C. § 1305. Clause 24 of instant bill of lading included a New Jason clause obligating cargo interests to "contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred . . . ." The New Jason clause is a lawful provision regarding general average. *The Jason*, 225 U.S. 32 (1912); Gilmore & Black § 5-13 at 267.

The bill of lading also provides for general average to be "adjusted in Beijing in accordance with China Council for Promotion of International Trade Provisional Rules for General Average Adjustment, 1975." These rules are very similar to the local rules applied in the United States and the United Kingdom. *Compare* Provisional Rules for General Average Adjustment of the China Council for the Promotion of International Trade, *reprinted in* 6 *Benedict*, Doc. No. 4-10 at 4-74 to 4-78 *with* Rules of Practice of the Association of Average Adjusters of the United States, *reprinted in* 6 *Benedict*, Doc. No. 4-8 at 4-48.9 to 4-59 *and* Rules of Practice of the English Association of Average Adjusters, *reprinted in* 6 *Benedict*, Doc. No. 4-9 at 4-60 to 4-73.

As has been noted in the Petition, there is considerable conflict about whether section 1303(8) of COGSA applies at all in this case since the dispute involves owner's claim for contribution in general average rather than a claim by a cargo owner for cargo damage. *Cf. State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir.), *cert. denied*, No. 88-115, 57 U.S.L.W. 3277 (1988) (claim for cargo damage). Moreover, if section 1303(8) of COGSA applies, then, as also noted in the Petition, the confusion in the

lower courts about its scope warrants a return by the Court to the work left undone in *Carbon Black Export, Inc. v. The Monrosa*, 359 U.S. 180 (1959).

But, in any event, the Court should hear this case because the decision below may violate international law.

The bill of lading provides for arbitration of disputes in Beijing. The use of arbitration to resolve maritime disputes is very old and this Court enforced such arbitration clauses even before enactment of the Federal Arbitration Act, 9 U.S.C. §§ 1-14. *See Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 122, 124 (1924). *See also Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 277-78 (1932).

It may be noted that Beijing is a growing center for arbitration of maritime disputes, joining New York, London, Paris, Tokyo, Gdynia and Moscow. The Chinese rules are published. 6 *Benedict*, Doc. No. 4-10 at 4-74 to 4-78. The procedures followed in Beijing have been extensively discussed. *E.g.*, Pew, Jarvis & Sidel, *The Maritime Arbitration Commission of the People's Republic of China: Options and Strategies*, 18 J. Int'l L. & Com. 351 (1987); Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China*, Int'l Bus. Lawyer, Oct. 1987, at 395; Broedermann, *China and Admiralty—An Introduction to Chinese Maritime Law and U.S.-China Shipping Relations*, 15 J. Int'l L. & Com. 419 (1984), 15 J. Int'l L. & Com. 539 (1984) and 16 J. Int'l L. & Com. 65 (1985). Recently Chinese maritime arbitration awards were translated into English and distributed in booklet form at the VIIIth International Congress of Maritime Arbitrators held in Madrid in October 1987. China Council for the Promotion of International Trade Maritime Arbitration Commission, *Selection of Awards and Conciliation Statements* (Publishing House of Law 1985).

The petitioner demanded arbitration of its general average claim but the Fifth Circuit held that the bill of lading clause providing for arbitration in China was unenforceable. *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988).

The Federal Arbitration Act was originally enacted in 1925, before COGSA, and provides that an arbitration clause "in any maritime transaction or contract" is "valid, irrevocable, and enforceable." 9 U.S.C. § 1. The statute was reenacted into positive law (as Title 9 of the U.S. Code) in 1947, after COGSA. In the leading case applying section 1303(8) of COGSA in this country, the Second Circuit observed that if there was any inconsistency between COGSA and the Federal Arbitral Act, "presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947." *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 204 n.4 (2d Cir. 1967).

Both China and the United States are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3, *reprinted in* 9 U.S.C.A. Supp. at 184-92 (1988) *and* 6 *Benedict*, Doc. No. 7-3 at 7-16 to 7-22. Article II of the Convention states:

> Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

In 1970, more than thirty years after COGSA, Congress enacted Chapter 2 of Title 9 to implement the international obligations of the United States under the Arbitration Convention. 9 U.S.C. §§ 201-208. Section 206 provides in pertinent part:

> A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.

In recent years this Court has been especially supportive of international arbitration as a vehicle for alternative dispute resolution. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-*

*Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985); *Scherk v. Alberto Culver Corp.*, 417 U.S. 506 (1974).

It is a basic principle of statutory construction that an Act of Congress, like COGSA, will not be construed so as to cause the United States to be in violation of a treaty obligation. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). In addition, if there is a conflict between an older statute like COGSA, and a more recent treaty or a newer congressional enactment, like the Arbitration Convention as well as the 1947 reenactment of the Arbitration Act and the 1970 amendments to the Act, the latter prevail. *Cook v. United States*, 288 U.S. 102, 118-19 (1933); *Chew Heong v. United States*, 112 U.S. 536, 550 (1884); Restatement (Third) of the Law of Foreign Relations of the United States § 115(2) (1987).

A few years ago, in a case which applied Article III(8) of the Hague Rules (the analog of COGSA section 1303(8)) to block litigation in the Dutch courts, the English House of Lords went out of its way to note that the result might well have been different if an arbitration clause had been involved. *The Hollandia*, [1983] 1 A.C. 565, 576 (H.L.(E)).

There is a substantial possibility that the decision below causes the United States to be in breach of its treaty obligations.

## 2. THIS COURT SHOULD RESOLVE THE LOWER COURTS' CONFLICT ABOUT THE ENFORCEABILITY OF FOREIGN ARBITRATION CLAUSES IN BILLS OF LADING.

The special problem of the impact of COGSA on international arbitration came up in the most recent Term but the Court declined to consider it at that time. *State Establishment for Agricultural Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir.), *cert. denied*, No. 88-115, 57 U.S.L.W. 3277 (1988). This case raises the same issue and it may be anticipated that the issue will continue to vex ocean shipping until this Court resolves it, particularly because it is an increasingly common practice to include foreign arbitration clauses in bills of lading. That there already is conflict among the lower courts on the

enforceability of foreign arbitration clauses in bills of lading is clear. *Compare Wesermunde*, 838 F.2d 1576 *with*, *e.g.*, *Travelers Indemnity Co. v. M/V Mediterranean Star*, 1988 AMC 2483, 2484, 1988 U.S. Dist. LEXIS 7221 (S.D.N.Y. July 19, 1988); *Midland Tar Distillers, Inc. v. M/T Lotos*, 362 F. Supp. 1311, 1315 (S.D. N.Y. 1973); *Mitsubishi Shoji Kaisha Ltd. v. M.S. Galini*, 323 F. Supp. 79, 83-84 (S.D. Tex 1971); *Kurt Orban Co. v. S/S Clymenia*, 318 F. Supp. 1387, 1390 (S.D.N.Y. 1970). *See also Lowrey & Co. v. S.S. Le Moyne D'Iberville*, 253 F. Supp. 396, 399 (S.D.N.Y. 1966), *appeal dismissed*, 372 F.2d 123, 124 (2d Cir. 1967); *Michael v. S.S. Thanasis*, 311 F. Supp. 170 (N.D. Cal. 1970).

Accordingly, review by the Court is desirable not only to determine whether the decision below causes a breach of international law but also to eliminate wasteful potential litigation about the enforceability of clauses in bills of lading providing for arbitration abroad.

## CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: January 6, 1989.

Respectfully submitted,

By /s/ LIZABETH L. BURRELL

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## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On January 6, 1989, I served the within Motion to File *Amicus Curiae* Brief and Brief in Support of the Petition for a Writ of Certiorari in re: "Guangzhou Maritime Transport Bureau of China v. Hughes Drilling Fluids" in the United States Supreme Court, October Term 1988, No. 88-777, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 6, 1989, at New York, New York.

LIZABETH L. BURRELL
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(4)

NO. 88-777

Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1988

GUANGZHOU MARITIME
TRANSPORT BUREAU OF CHINA,
*Petitioner*

v.

HUGHES DRILLING FLUIDS,
*Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## OPPOSITION OF HUGHES DRILLING FLUIDS TO THE MOTION BY THE MARITIME LAW ASSOCIATION TO FILE AMICUS CURIAE BRIEF

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## SUMMARY OF ARGUMENT

The motion of the Maritime Law Association of the United States (MLA) to file an amicus brief should be denied because the brief does not contribute to an understanding of the issues. The MLA incorrectly assumed the bill of lading in this case contains an arbitration clause, and urges the Court to accept writs because the failure to enforce the so-called arbitration clause may violate an international arbitration convention, the Federal Arbitration Act and district court decisions upholding arbitration clauses. The bill of lading does not require arbitration and the MLA's arguments are irrelevant.

## ARGUMENT

As its first point of argument, the MLA claims the decision of the Court of Appeals for the Fifth Circuit may violate international law, referring to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter Convention). Applicant erroneously describes the appellate court's ruling as "Petitioner demanded arbitration of its general average claim but the Fifth Circuit held the bill of lading clause providing for arbitration in China was unenforceable. *Hughes Drilling Fluids v. M/V LUO FU SHAN,* 852 F.2d 840 (5th Cir. 1988)." This is a misstatement of the proceedings in the district court and in the appellate court. Petitioner did not move to stay the proceedings pending arbitration in the district court because the bill of lading does not contain an arbitration clause; the bill of lading contains a forum selection clause, which the Fifth Circuit held was unenforceable as violative of COGSA.

The MLA does not cite the bill of lading provision it claims is an arbitration clause, but Clause 2, the forum selection clause, is the only clause which refers to

arbitration.[1] Clause 2 provides in part:

> All disputes arising under or in connection with the Bill of Lading shall be determined by Chinese Law in the courts of, or by arbitration in the People's Republic of China.

On its face, this clause does not stipulate disputes shall be resolved by arbitration. Clause 2 purports to select the forum but allows dispute resolution by *either* litigation or arbitration. *In answer to a specific question from the Fifth Circuit panel, petitioner admitted at oral argument the bill of lading does not contain a binding arbitration clause.* Petitioner and respondent did not address the enforceability of an arbitration clause in a foreign forum, not because they did not think of it, but because the facts do not warrant the argument.

As applicant indicates in its brief, the Convention provides "Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration...." 21 U.S.T. 2517, 2519, T.I.A.S. No. 6997. The Federal Arbitration Act, 9 U.S.C. §2, provides "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . .shall be valid, irrevocable, and

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[1] Clause 24 provides "General average shall be adjusted in Beijing in accordance with China Counsel for the Promotion of International Trade Provisional Rules for General Average Adjustment, 1975." This clause addresses the adjustment of general average, that is, the computation of the amount each cargo interest must contribute if the vessel is seaworthy and the shipowner entitled to recover from cargo the damages to the vessel. Petitioner/shipowner has completed the adjustment according to Clause 24 and presented a demand for $452,200. The cargo owner is entitled to litigate the adjustment and its liability to pay, and Clause 24 does not restrict that right.

enforceable. . . ." Obviously, both the Convention and the Act contemplate the existence of an arbitration provision. In analyzing the applicability of the Act, this Court has written "The first task of a Court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985). As with any contract, the parties' intentions control, *id.* Both petitioner and respondent agree the bill of lading does not require the parties to arbitrate, therefore, applicant's argument that the Fifth Circuit's decision may conflict with the Convention and the Federal Arbitration Act, and with decisions of the district courts enforcing arbitration clauses is unjustified.[2]

With respect to the relevant issues, briefed by petitioner and respondent, applicant contributes two sentences. It states there is a conflict regarding the application of §1303(8) of COGSA to general average, citing *State Establishment for Agricultural Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (11th Cir.), *cert denied*, 57 U.S.L.W. 3277 (U.S. Oct. 18, 1988). *WESERMUNDE* involved a cargo damage claim subject to a binding arbitration clause in a charter party and did not mention general average, and this statement adds nothing to an understanding of the relationship between §1303(8), COGSA, and general average.

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[2] Respondent questions whether a valid agreement to arbitrate is created by a common carrier's insertion of an arbitration clause in an order bill of lading, particularly where the cargo owner is unaware of the terms of the bill of lading which he receives in the mail from a broker after the cargo is purchased, and where the bill of lading is not made subject to a charter party. Because there is no arbitration clause in the bill of lading, that issue is not before the Court.

Applicant also repeats the position of petitioner that there is confusion in the lower courts about the scope of §1303(8). As respondent previously demonstrated in its original brief in opposition to the issuance of a writ, there is no confusion among the federal courts of appeals concerning the issue in this case, that is, the invalidity of a forum selection clause in a bill of lading governed by COGSA. The Second, Fourth, Fifth and Eleventh Circuits all hold a forum selection clause in a COGSA bill of lading is unenforceable. The Ninth Circuit is the only federal court of appeals to enforce a forum selection clause in a bill of lading subject to COGSA, but only because COGSA applied by agreement and not by force of law, a distinction not present in this case or the preceding jurisprudence. The suggestion that there is confusion among the lower courts is deliberately vague and unsupportable.

## CONCLUSION

Applicant asked to participate as amicus curiae, ostensibly because the "MLA can make a unique contribution on relevant issues." Applicant devotes its efforts to explaining how the Fifth Circuit's refusal to enforce "the arbitration clause" violates the Convention, the Federal Arbitration Act and district court decisions upholding arbitration clauses. Applicant has missed the issue before the Court and its "unique contribution" is confusion and distraction. Respondent urges the Court to deny the motion by the Maritime Law Association to file an amicus curiae brief.

Respectfully submitted,

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